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Torts—Limitations on Actions—Arkansas Adopts Continuous Treatment Rule to Toll Statute of Limitations in Medical Malpractice Actions. *Lane v. Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988).

John D. Nichols

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TORTS—LIMITATIONS ON ACTIONS—ARKANSAS ADOPTS CONTINUOUS TREATMENT RULE TO TOLL STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE ACTIONS. *Lane v. Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988).

Dr. Walter Lane treated Maxine Lane for migraine headaches from 1966 until 1984.¹ Dr. Lane's treatment of the headaches included regular injections of various types of narcotics. In 1985 Mrs. Lane brought a medical malpractice action against Dr. Lane alleging that the treatment caused a number of injuries, including drug addiction, drug dependency, drug abuse, and extensive scarring of her back, arms, and shoulders.

Dr. Lane moved for summary judgment prior to trial. He contended that because Mrs. Lane's scarring and drug addiction became apparent by 1979, the cause of action accrued at that time and was barred under Arkansas' two-year medical malpractice statute of limitations.² The Pope County Circuit Court denied the motion and ruled that the statute of limitations did not run until the end of a continuous course of treatment by the physician.

At the close of evidence, Dr. Lane moved for a directed verdict and asked the court to reconsider the summary judgment motion based on the limitations period. The court denied both motions and the jury awarded Mrs. Lane \$44,000. After the verdict, Dr. Lane moved for judgment n.o.v. and sought a reduction of the jury award to \$13,000 to conform to Mrs. Lane's evidence of damages. Mrs. Lane elected to have a new trial rather than accept the remittitur ordered by the court.

Dr. Lane appealed the denial of his motions for summary judgment and directed verdict on the statute of limitations issue, but the

1. The Lanes were married in 1974 and divorced in 1985. However, the court did not address the issue of a physician treating a family member. *Lane v. Lane*, 295 Ark. 671, 673, 752 S.W.2d 25, 26 (1988).

2. ARK. CODE ANN. § 16-114-203 (1987) provides in pertinent part:

(a) All actions for medical injury shall be commenced within two (2) years after the cause of action accrues.

(b) The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time. However, where the action is based upon the discovery of a foreign object in the body of the injured person which is not discovered and could not reasonably have been discovered within such two-year period, the action may be commenced within one (1) year from the date of discovery or the date the foreign object reasonably should have been discovered, whichever is earlier.

Arkansas Supreme Court affirmed the denials. The court adopted the continuous treatment rule and held that the statute of limitations does not commence running in appropriate medical malpractice actions until the physician terminates a continuous course of treatment. Since Dr. Lane's treatment terminated in July 1984, and Mrs. Lane commenced the action in May 1985, the complaint was brought within the two year limitations period. *Lane v. Lane*, 295 Ark. 671, 752 S.W.2d 25 (1988).

The primary purpose of a statute of limitations is to protect the defendant from defending a claim after memories have faded, witnesses have died or disappeared, and evidence has been lost.³ Arkansas courts hold that a statute of limitations protects the defendant from having to defend an action in which passage of time would impair the truth finding process.⁴ The limitations period in medical malpractice actions traditionally ran from the time of the wrongful act or omission.⁵ The cause of action accrued when the act or omission caused injury,⁶ regardless of the plaintiff's knowledge or reason to know of the injury.⁷

The harshness of the traditional rule led to a variety of exceptions as courts developed methods to circumvent the rule and avoid unjust results.⁸ Fraudulent concealment of the injury or negligent act or omission tolled the statute of limitations in most jurisdictions,⁹ including Arkansas.¹⁰ In some courts, the defendant's silence in a confidential relationship tolled the statute of limitations.¹¹ The physician's failure to discover and remove a foreign object left in the plaintiff's

3. *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). *See also* *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statute of limitations purpose is to protect courts and defendants from stale claims).

4. *McEntire v. Malloy*, 288 Ark. 582, 586, 707 S.W.2d 773, 776 (1986).

5. 1 D. LOISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* ¶ 13.06 (1987) [hereinafter LOISELL].

6. 2 S. PEGALIS & H. WACHSMAN, *AMERICAN LAW OF MEDICAL MALPRACTICE* § 6:7 (1981). *See generally* Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L.Q. 339 (1962).

7. RESTATEMENT (SECOND) OF TORTS § 899 comment e (1979).

8. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 30, at 166 (5th ed. 1984).

9. *Id.*

10. *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934) (physician's failure to apprise plaintiff of foreign object left in her body after surgery was fraudulent concealment sufficient to toll limitations period). *See also* *Field v. Gazette Publishing Co.*, 187 Ark. 253, 59 S.W.2d 19 (1933) (cause of action accrues at time of injury unless defendant fraudulently conceals cause or extent of injury).

11. *See, e.g., Morrison v. Acton*, 68 Ariz. 27, 198 P.2d 590 (1948) (defendant physician's silence is constructive fraud when duty to speak exists).

body after surgery constituted a continuing tort in other jurisdictions.¹² Some courts adopted the discovery rule,¹³ which tolled the statute of limitations until the plaintiff discovered or should have discovered the injury.¹⁴

The continuous treatment rule first appeared in *Gillette v. Tucker*,¹⁵ an Ohio Supreme Court decision. In *Gillette* the defendant surgeon left a surgical sponge in the plaintiff's body after an appendectomy.¹⁶ The court held that the statute of limitations was tolled until the termination of the physician-patient relationship.¹⁷ The rationale for the continuous treatment rule was based on: (1) the theory that the plaintiff suffered a continuous injury while the foreign object was in her body; and (2) a continuing contractual relationship between the physician and the patient.¹⁸ Since *Gillette*, courts have distinguished the termination of the physician-patient relationship rule¹⁹ from the continuous treatment rule.²⁰

The continuous treatment rule has slowly but steadily gained ju-

12. See *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902) (plaintiff suffered continuous injury until foreign object removed from body). But cf. *Williams v. Edmondson & Ward*, 257 Ark. 837, 520 S.W.2d 260 (1975) (continuing tort theory is legislative issue). In Arkansas, this issue is addressed under the statutory discovery rule for foreign objects left in the patient's body. ARK. CODE ANN. § 16-114-203 (1987).

13. Under the discovery rule, the medical malpractice statute of limitations "is initiated, not by the negligence that is the basis of the action, but by the patient's discovery that he has been injured by medical treatment." LOUISELL, *supra* note 5, ¶ 13.07, at 13-20. See, e.g., *Iverson v. Lancaster*, 158 N.W.2d 507 (N.D. 1968) (cause of action accrued when plaintiff's condition correctly diagnosed and malpractice discovered).

14. *Franklin v. Albert*, 381 Mass. 611, 411 N.E.2d 458 (1980) (cause of action accrued at the time the injured person discovered or through the exercise of reasonable diligence should have discovered the injury).

15. 67 Ohio St. 106, 65 N.E. 865 (1902).

16. *Id.* at 108, 65 N.E. at 866.

17. *Id.* at 129, 65 N.E. at 871.

18. *Id.* at 133, 65 N.E. at 872.

19. The physician-patient relationship rule could toll the statute of limitations long beyond the last date of treatment for the particular injury or condition involving the malpractice. Under this rule, the cause of action accrues when the physician-patient relationship actually ends. LOUISELL, *supra* note 5, at ¶ 13.09. See, e.g., *Ishler v. Miller*, 56 Ohio St. 2d 447, 384 N.E.2d 296 (1978) (date physician-patient relationship terminates is time malpractice action accrues). Cf. *Hundley v. St. Francis Hosp.*, 161 Cal. App. 2d 800, 327 P.2d 131 (1958) (statute of limitations tolled during physician-patient relationship unless patient actually discovers negligence).

20. *Johnson v. Winthrop Laboratories*, 291 Minn. 145, 190 N.W.2d 77 (1971) (limitations period runs when treatment ceases); *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943) (statute of limitations runs when physician terminates treatment for condition arising from malpractice); *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941) (statute of limitations does not run until treatment ends); *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962) (limitations period does not run until continuing course of treatment terminates). See generally LOUISELL, *supra* note 5, at ¶ 13.08 (under continuous treatment

dicial acceptance.²¹ Several policy considerations are offered in support of the rule. The rule fosters the physician-patient relationship by allowing the patient to pursue effective treatment without losing his cause of action.²² The rule also provides the physician an opportunity to correct the injury and avoid potential malpractice actions.²³ Finally, while the purpose of a statute of limitations is to protect the defendant and courts from stale claims,²⁴ it is unfair to bar a legitimate claim because of the patient's trust in the physician or the latent nature of the injury.²⁵

Application of the continuous treatment doctrine led to much litigation as courts developed the scope of the rule.²⁶ To toll the limitations period, many jurisdictions required that the treatment be for the same or a related illness, injury, or condition involving the malpractice.²⁷ Other courts tolled the statute of limitations until the termination of the physician-patient relationship.²⁸ Courts have also confronted the issue of whether the statute begins to run when the plaintiff discovers the injury before the continuous treatment ends.

rule, limitations period runs when treatment for the particular injury or condition involving the malpractice terminates).

21. See *supra* note 20. See also LOUISELL, *supra* note 5, at ¶ 13.08 nn.81 & 84 (discussing additional jurisdictions recognizing the rule).

22. *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962). The *Borgia* court reasoned that "[i]t would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician . . ." *Id.* at 156, 187 N.E.2d at 779, 237 N.Y.S.2d at 321-22.

23. See, e.g., *McDermott v. Torre*, 56 N.Y.2d 399, 437 N.E.2d 1108, 452 N.Y.S.2d 351 (1982). The *McDermott* court determined that "[i]mplicit in the policy [behind the continuous treatment rule] is the recognition that the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so." *Id.* at 408, 437 N.E.2d at 1112, 452 N.Y.S.2d at 355.

24. See *supra* text accompanying notes 3-4.

25. Zepkin, *Virginia's Continuing Negligent Treatment Rule: Farley v. Goode and Fenton v. Danaceau*, 15 U. RICH. L. REV. 231, 232-33 (1981).

26. Comment, *The Continuous Treatment Doctrine: A Toll on the Statute of Limitations for Medical Malpractice in New York*, 49 ALB. L. REV. 64, 72 (1984).

27. *Johnson v. Winthrop Laboratories*, 291 Minn. 145, 190 N.W.2d 77 (1971) (continuous and substantially uninterrupted course of treatment for particular illness necessary to toll limitations period); *Thatcher v. De Tar*, 351 Mo. 603, 173 S.W.2d 760 (1943) (statute of limitations runs when physician terminates course of treatment for same or related illness); *Borgia v. City of New York*, 12 N.Y.2d 151, 187 N.E.2d 777, 237 N.Y.S.2d 319 (1962) (continuous treatment must be related to original condition or illness to toll statute of limitations); *Frazor v. Osborne*, 57 Tenn. App. 10, 414 S.W.2d 118 (1966) (same or related illness or injury); *Metzger v. Kalke*, 709 P.2d 414 (Wyo. 1985) (treatment for illness or condition involving or related to malpractice). See generally 2 S. PEGALIS & H. WACHSMAN, *supra* note 6, at § 6:10 (discussing various definitions of continuous treatment rule recognized by courts).

28. See, e.g., *Ishler v. Miller*, 56 Ohio St. 2d 447, 384 N.E.2d 296 (1978) (date physician-patient relationship terminates is time malpractice action accrues).

Most courts hold that the limitations period runs from the date the patient discovered or should have discovered the negligence or injury.²⁹ One court, however, tolled the statute until the physician-patient relationship terminated despite the patient's discovery of the malpractice.³⁰

Arkansas followed the traditional rule that any personal injury action accrued at the time of the negligent act or omission.³¹ In *Burton v. Tribble*³² the Arkansas Supreme Court first addressed the tolling of the statute of limitations in a medical malpractice action. The defendant physician left a foreign object in the plaintiff's body after surgery and continued to treat her without discovering and disclosing the negligence.³³ The court ruled that the plaintiff's malpractice action was not barred, although the action was not brought until discovery of the negligence seven years after the surgery.³⁴ In departing from the traditional rule, the court held that the physician's fraudulent concealment of the injury tolled the limitations period until the physician corrected the injury or the plaintiff learned or should have learned of the injury.³⁵ The *Burton* court cited *Gillette v. Tucker*³⁶ in

29. *Hundley v. St. Francis Hosp.*, 161 Cal. App. 2d 800, 327 P.2d 131 (1958) (limitations period tolled unless plaintiff actually discovers negligence); *Couvillion v. St. Paul Fire & Marine Ins. Co.*, 328 So. 2d 737 (La. App. 1976) (statute ran when patient discovered injury regardless of future treatment by the physician); *Waldman v. Rohrbaugh*, 241 Md. 137, 215 A.2d 825 (1966) (patient's discovery of negligence commenced limitations period); *Jones v. Sugar*, 18 Md. App. 99, 305 A.2d 219 (1973) (statute ran when plaintiff should reasonably have known she had cause of action); *Murray v. Fox*, 300 Minn. 373, 220 N.W.2d 356 (1974) (cause of action accrued on date of surgery despite subsequent treatment when plaintiff should have known of malpractice).

30. *Ishler v. Miller*, 56 Ohio St. 2d 447, 384 N.E.2d 296 (1978) (court rejected view that discovery of injury prior to termination of physician-patient relationship commenced limitations period).

31. *Field v. Gazette Publishing Co.*, 187 Ark. 253, 59 S.W.2d 19 (1933). In *Field* the plaintiff sued his former employer for negligence in failing to furnish a safe work place. The plaintiff contracted lead poisoning, a well-recognized industrial disease, and received medical treatment as soon as the disease manifested itself in 1926. He continued to work intermittently, but became incapacitated in 1928. The plaintiff filed suit in 1929, and the court held that the action was barred under the three year statute of limitations. The court found that the cause of action accrued at the time the disease first manifested itself and not at the time the full extent of the damages was determined.

32. 189 Ark. 58, 70 S.W.2d 503 (1934).

33. *Id.* at 59, 70 S.W.2d at 503.

34. *Id.* at 62, 70 S.W.2d at 504.

35. *Id.* *Burton* has been misconstrued as recognizing the discovery rule for medical malpractice actions in Arkansas. *Treat v. Kreutzer*, 290 Ark. 532, 535, 720 S.W.2d 716, 718 (1986); *Williams v. Edmondson & Ward*, 257 Ark. 837, 848, 520 S.W.2d 260, 267 (1975). A careful reading reveals the *Burton* court tolled the statute of limitations because the physician fraudulently concealed the tort. *Burton*, 189 Ark. at 62, 70 S.W.2d at 504.

36. 67 Ohio St. 106, 65 N.E. 865 (1902). See *supra* text accompanying notes 15-18.

reasoning that the physician's failure to discover and remove the foreign object from the plaintiffs' body was a breach of the physician-patient relationship and a continuing tort.³⁷

In response to *Burton* the Arkansas General Assembly adopted a medical malpractice statute of limitations.³⁸ The statute established a three year limitations period³⁹ and provided that the cause of action accrued on the "date of the wrongful act complained of and no other time."⁴⁰ In *Steele v. Gann*⁴¹ the Arkansas Supreme Court interpreted the statute for the first time, holding that the legislature intended the cause of action to accrue and the limitations period to run from the date of the injury.⁴² The court rejected the plaintiffs' claim that the statute did not begin to run until the plaintiff discovered the injury.⁴³

The Arkansas Supreme Court continued to strictly interpret the statute of limitations, but relied on the fraudulent concealment exception to avoid injustice.⁴⁴ Some justices criticized the court for being too quick in finding fraudulent concealment.⁴⁵ In *Jones v. C.A.R.T.I.*⁴⁶ the plaintiff filed a malpractice action more than two years after suffering injuries during radiation therapy. The court found that the physician's dilatory tactics and failure to schedule further examinations until the limitations period had run constituted fraudulent concealment.⁴⁷ Justice Stroud's dissent questioned whether fraudulent concealment existed when the defendants first learned of the plaintiff's injuries from the plaintiff himself.⁴⁸

Similarly, in *Crossett Health Center v. Croswell*⁴⁹ the plaintiff brought an action upon discovering that a foreign object was left in

37. *Burton*, 189 Ark. at 61, 70 S.W.2d at 504.

38. Act of Mar. 20, 1935, No. 135, § 1, 1935 Ark. Acts 135 (codified as amended at ARK. CODE ANN. § 16-114-203 (1987)).

39. In 1945 the Arkansas General Assembly shortened the medical malpractice limitations period from three years to two years. Act of Feb. 16, 1945, No. 58, § 1, 1945 Ark. Acts 58 (codified as amended at ARK. CODE ANN. § 16-114-203 (1987)).

40. ARK. CODE ANN. § 16-114-203 (1987) provides in pertinent part: "The date of the accrual of the cause of action shall be the date of the wrongful act complained of and no other time."

41. 197 Ark. 480, 123 S.W.2d 520 (1939).

42. *Id.* at 485, 123 S.W.2d at 523.

43. *Id.* at 486, 123 S.W.2d at 523.

44. See *Jones v. C.A.R.T.I.*, 270 Ark. 988, 607 S.W.2d 334 (1980); *Crossett Health Center v. Croswell*, 221 Ark. 874, 256 S.W.2d 548 (1953).

45. See *C.A.R.T.I.*, 270 Ark. at 991, 607 S.W.2d at 336 (Stroud, J., dissenting); *Croswell*, 221 Ark. at 884, 256 S.W.2d at 553 (Smith, J., dissenting).

46. 270 Ark. 988, 607 S.W.2d 334 (1980) (4-3 decision).

47. *Id.* at 990, 607 S.W.2d at 335.

48. *Id.* at 991, 607 S.W.2d at 336 (Stroud, J., dissenting).

49. 221 Ark. 874, 256 S.W.2d 548 (1953).

her body after surgery. Although the suit was brought more than two years after the surgery, the court concluded that the action was not barred.⁵⁰ The court found that the defendants' failure to discover the foreign object presented a fraudulent concealment question for the jury.⁵¹ In a strong dissent Justice Smith stated "[t]here could be no [fraudulent] concealment of a fact which was unknown to the defendants."⁵²

The court expressly declined opportunities to adopt less restrictive rules to determine the date when the cause of action accrued in medical malpractice actions. In *Owen v. Wilson*⁵³ the court refused to adopt the continuing tort theory and held that the issue was a legislative question.⁵⁴ In *Williams v. Edmondson & Ward*⁵⁵ the court rejected the discovery rule.⁵⁶ The court construed the malpractice statute of limitations as running from the date of the wrongful act regardless of the plaintiff's lack of knowledge of the injury.⁵⁷

In 1979 the Arkansas General Assembly adopted a limited discovery rule for medical malpractice actions involving foreign objects left in the plaintiff's body.⁵⁸ If the object is not discovered during the limitations period, the action can be brought within one year from the date the object is or should have been discovered.⁵⁹ The legislature also codified the common law rule⁶⁰ tolling the malpractice statute of

50. *Id.* at 878, 256 S.W.2d at 550.

51. *Id.*

52. *Id.* at 884, 256 S.W.2d at 553 (Smith, J., dissenting).

53. 260 Ark. 21, 537 S.W.2d 543 (1976).

54. *Id.* at 24, 537 S.W.2d at 544. The continuing tort theory would treat a single negligent act as a continuing injury until the injury is either discovered by the patient or corrected by the physician. For example, a misdiagnosis or negligent X-ray reading would effectively toll the statute of limitations on the theory that the plaintiff was damaged throughout the entire period. See *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934); *Silvertooth v. Shallenberger*, 49 Ga. App. 758, 176 S.E. 829 (1934); *Gillette v. Tucker*, 67 Ohio St. 106, 65 N.E. 865 (1902).

55. 257 Ark. 837, 520 S.W.2d 260 (1975).

56. *Id.* at 848, 520 S.W.2d at 267. See *supra* notes 13-14 and accompanying text for discussion of the discovery rule.

57. 257 Ark. at 848, 520 S.W.2d at 267.

58. Act of Apr. 2, 1979, No. 709, § 4, 1979 Ark. Acts 709 (codified as amended at ARK. CODE ANN. § 16-114-203 (1987)).

59. ARK. CODE ANN. § 16-114-203(b) (1987) provides in pertinent part:

[W]here the action is based upon the discovery of a foreign object in the body of the injured person which is not discovered and could not reasonably have been discovered within [the two-year limitations period], the action may be commenced within one (1) year from the date of discovery or the date the foreign object reasonably should have been discovered, whichever is earlier.

60. See *Graham v. Sisco*, 248 Ark. 6, 449 S.W.2d 949 (1970) (general savings clause for minors applicable to any statute of limitations).

limitations for minors and incompetents.⁶¹ The statute allows a minor plaintiff to bring an action until age nineteen⁶² and provides that any person who was incompetent at the time of the injury has until one year after the disability is removed to bring suit.⁶³ In *Treat v. Kreutzer*⁶⁴ the court refused to expand the limitations period beyond the scope established by the legislature.

After *Treat* it appeared certain that Arkansas courts would continue to strictly construe the medical malpractice limitations period. In *Lane v. Lane*,⁶⁵ however, the court effected a major liberalization of the statute. With Justice Hays speaking for the majority,⁶⁶ the court adopted the continuous treatment rule⁶⁷ and held that the statute of limitations in medical malpractice actions is tolled during a continuous course of improper treatment.⁶⁸ The court distinguished the continuous treatment rule from the continuing tort theory it had previously rejected,⁶⁹ holding that the continuing tort theory⁷⁰ was a public policy issue.⁷¹ To recognize the continuing tort theory, the court said, would have the practical effect of applying the discovery

61. Act of Apr. 2, 1979, No. 709, § 4, 1979 Ark. Acts 709 (codified as amended at ARK. CODE ANN. § 16-114-203 (1979)).

62. ARK. CODE ANN. § 16-114-203(c) (1987) provides in pertinent part: "A minor under the age of eighteen (18) years at the time of the act, omission, or failure complained of, shall in any event have until his nineteenth birthday in which to commence an action."

63. *Id.* § 16-114-203(d) provides in pertinent part: "Any person who had been adjudicated incompetent at the time of the act, omission, or failure complained of, shall have until one (1) year after that disability is removed in which to commence an action."

64. 290 Ark. 532, 720 S.W.2d 716 (1986) (rejecting discovery rule and holding that continuing tort theory is legislative issue).

65. 295 Ark. 671, 752 S.W.2d 25 (1988).

66. Hickman, J., dissented but wrote no opinion. *Id.* at 678, 752 S.W.2d at 29.

67. *Id.* at 677, 752 S.W.2d at 28. The court quoted LOUISELL, *supra* note 5, ¶13.08, at 13-34 in defining the continuous treatment rule:

[I]f the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

Lane, 295 Ark. at 674, 752 S.W.2d at 26-27.

68. *Lane*, 295 Ark. at 674, 752 S.W.2d at 27.

69. *Id.* at 675, 752 S.W.2d at 27. The court cited three previous decisions to distinguish the continuous treatment rule from the continuing tort theory: *Treat v. Kreutzer*, 290 Ark. 532, 720 S.W.2d 716 (1986) (misdiagnosis is not a continuing tort); *Owen v. Wilson*, 260 Ark. 21, 537 S.W.2d 543 (1976) (failure to remove foreign object from patient's body after surgery is a single negligent act and not a continuing tort); *Williams v. Edmondson & Ward*, 257 Ark. 837, 520 S.W.2d 260 (1975) (injury is complete at time physician misreads X-ray).

70. See *supra* note 54.

71. *Lane*, 295 Ark. at 675, 752 S.W.2d at 27.

rule.⁷² This would be contrary to the statute's express language that the cause of action accrues on "the date of the wrongful act complained of and no other time."⁷³

The court concluded, however, that the continuous treatment rule does not conflict with the statute.⁷⁴ The court relied on *Farley v. Goode*⁷⁵ for the proposition that even a state with a "time of injury" statute for medical malpractice actions⁷⁶ recognized the continuous treatment rule.⁷⁷ Prior to *Farley* the Virginia Supreme Court held that the cause of action accrued and the limitations period ran when the wrong was done and not when the plaintiff discovered the injury.⁷⁸ The *Farley* court determined that when malpractice occurred during a continuous course of treatment for a particular condition, the statute of limitations ran when the treatment terminated.⁷⁹ The court reasoned that the entire course of treatment was inherently negligent.⁸⁰ However, *Farley* limited the rule by excluding malpractice actions where the complaint alleged a single, isolated negligent act.⁸¹

The *Lane* court also reasoned that the continuous treatment rule is logical and fair.⁸² Barring legitimate claims merely because the plaintiff cannot identify a single negligent treatment that caused the injury is inequitable.⁸³ The rule also gives the physician an opportunity to correct the error before harm results.⁸⁴ Moreover, the rule does not force the plaintiff to disturb the physician-patient relationship by terminating treatment in order to preserve the cause of action.⁸⁵ Finally, the court recognized a steady trend toward judicial

72. *Id.* See *supra* notes 13-14 and accompanying text.

73. *Lane*, 295 Ark. at 675, 752 S.W.2d at 27 (quoting ARK. CODE ANN. § 16-114-203 (1987)).

74. *Id.* at 676-77, 752 S.W.2d at 28.

75. 219 Va. 969, 252 S.E.2d 594 (1979).

76. VA. CODE ANN. § 8.01-230 (1984 & Supp. 1988) provides in pertinent part: "[T]he cause of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained in the case of injury to the person"

77. *Lane*, 295 Ark. at 677, 752 S.W.2d at 28.

78. *Farley*, 219 Va. at 974, 252 S.E.2d at 598.

79. *Id.* at 976, 252 S.E.2d at 599.

80. *Id.*

81. *Id.* at 980, 252 S.E.2d at 601. The *Farley* court stated "[w]here the malpractice complained of constitutes a single, isolated act, however, the [time of injury rule] will continue to apply." *Id.* The *Lane* court did not provide such explicit guidance. *Lane* left unanswered the question of whether the limitations period will be tolled if there is a single negligent act followed by a continuous course of non-negligent treatment.

82. *Lane*, 295 Ark. at 675-76, 752 S.W.2d at 27.

83. *Id.* (quoting LOUISELL, *supra* note 5, at ¶ 13.08).

84. *Id.*

85. *Id.*

acceptance of the continuous treatment rule.⁸⁶

Lane is significant for several reasons. The adoption of the continuous treatment rule is the first significant judicial liberalization of the medical malpractice limitations period since 1935.⁸⁷ Prior to *Lane* the court tolled the limitations period only for common law⁸⁸ or statutory exceptions.⁸⁹ The court repeatedly declined opportunities to change the medical malpractice limitations period and found the issue to be a public policy question for the legislature.⁹⁰

The *Lane* decision is also significant because the continuous treatment rule increases the potential liability of medical malpractice defendants.⁹¹ The rule favors the plaintiff in misdiagnosis, X-ray, and radiology treatment malpractice actions.⁹² Courts have also extended the continuous treatment rule to malpractice actions against other professionals. The rule has been used to toll the limitations period against attorneys,⁹³ architects,⁹⁴ insurance brokers,⁹⁵ and accountants.⁹⁶

86. *Id.* at 676, 752 S.W.2d at 27-28 (citing 16 jurisdictions recognizing the rule). *See also* LOUISELL, *supra* note 5, at ¶13.08 nn.81 & 84 for additional jurisdictions adopting the rule.

87. *See supra* text accompanying notes 53-57.

88. *Burton v. Tribble*, 189 Ark. 58, 70 S.W.2d 503 (1934) (fraudulent concealment of the injury tolls the statute of limitations in medical malpractice).

89. ARK. CODE ANN. § 16-114-203(c) & (d) (1987) (tolling statute of limitations for minors and incompetents). *See also* *Graham v. Sisco*, 248 Ark. 6, 449 S.W.2d 949 (1970) (general savings clause for minors applicable to any statute of limitations).

90. *Treat v. Kreutzer*, 290 Ark. 532, 535, 720 S.W.2d 716, 718 (1986); *Owen v. Wilson*, 260 Ark. 21, 24, 537 S.W.2d 543, 544 (1976); *Steele v. Gann*, 197 Ark. 480, 485, 123 S.W.2d 520, 523 (1939).

91. Arkansas subjects a variety of "medical care providers" to the statute. ARK. CODE ANN. § 16-114-201(2) (1987) reads in pertinent part:

"Medical care provider" means a physician, certified registered nurse anesthetist, physician's assistant, nurse, optometrist, chiropractor, physical therapist, dentist, podiatrist, pharmacist, veterinarian, hospital, nursing home, community mental health center, psychologist, clinic, or not-for-profit home health care agency licensed by the state or otherwise lawfully providing professional medical care or services, or an officer, employee or agent thereof acting in the course and scope of employment in the providing of such medical care or medical services[.]

92. Previously, the Arkansas Supreme Court held such actions barred under the medical malpractice statute. *Treat*, 290 Ark. 532, 720 S.W.2d 716 (1986) (misdiagnosis); *Williams v. Edmondson & Ward*, 257 Ark. 837, 520 S.W.2d 260 (1975) (misreading X-ray). *See also* *Jones v. C.A.R.T.I.*, 270 Ark. 988, 606 S.W.2d 752 (1980) (negligent radiation therapy malpractice action barred but for fraudulent concealment).

93. *Keller v. Denny*, 232 Va. 512, 352 S.E.2d 327 (1987).

94. *County of Broome v. Vincent J. Smith, Inc.*, 78 Misc. 2d 889, 358 N.Y.S.2d 998 (Sup. Ct. 1974).

95. *Ben Heller, Inc. v. St. Paul Fire & Marine Ins. Co.*, 107 Misc. 2d 687, 435 N.Y.S.2d 669 (Sup. Ct. 1981).

96. *Wilkin v. Dana R. Pickup & Co.*, 74 Misc. 2d 1025, 347 N.Y.S.2d 122 (Sup. Ct. 1973).

The precise ramifications of *Lane* will depend upon future litigation interpreting the scope of the continuous treatment rule. The court did not make clear what elements are necessary for the rule to apply. One limitation on the rule is that the statute will run if the plaintiff knows or should know the injury is attributable to malpractice.⁹⁷ However, this arguably gives judges new latitude to reach desired results. Proving whether a layperson knew or should have known she was the victim of malpractice is a speculative venture at best. For example, the court held that Mrs. Lane did not know or have reason to know that negligent treatment was responsible for her injuries, although she was addicted to drugs for several years before bringing the action.⁹⁸

Perhaps the most significant question left unsettled by *Lane* is whether the statute will be tolled if there is only a single negligent act, rather than a series of negligent acts. Suppose a patient develops an infection as a result of a negligent act by the physician during surgery. The patient does not know and has no reason to know the infection is attributable to malpractice, and the surgeon continues to provide non-negligent treatment for the infection. Nevertheless, one year later the infection causes complications, and the patient suffers injury. The physician's treatment terminates at that point. Two years later, the patient brings a medical malpractice action. Does the continuous treatment rule toll the statute of limitations?

The opinion in *Lane* suggests it would not. The court states that "the continuous treatment doctrine becomes relevant when the medical negligence consists of a series of negligent acts, or a continuing course of improper treatment."⁹⁹ Yet all of the policy considerations¹⁰⁰ for the rule dictate that the rule should apply. In all likelihood, the holding that a *series* of negligent acts is required for the rule to apply is necessitated by the language of section 16-114-203 that the cause of action accrues at the time of the wrongful act and no other time. Tolling the limitations period during a continuous course of

97. *Lane*, 295 Ark. at 674, 752 S.W.2d at 26-27. The court stated that the limitations period is tolled under the continuous treatment rule "unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive." *Id.* (quoting LOUISELL, *supra* note 5, at § 13.08).

98. *Id.* at 678, 752 S.W.2d at 28. The court also stated that "we are not inclined to hold that a physician, aware of a patient's drug dependency, may nurture the habit and continue to be the provider over a period of years and then successfully contend the patient should have brought the action earlier." *Id.* Arguably, the court would have tolled the statute regardless of Mrs. Lane's knowledge of the malpractice.

99. *Id.* at 675, 752 S.W.2d at 27.

100. See *supra* text accompanying notes 22-25.

negligent treatment does no violence to the statute since the wrongful acts did in fact occur at different times throughout the treatment. However, where only a single negligent act has occurred, application of the continuous treatment rule would be contrary to the express statutory language. Regardless of future decisions, *Lane* is a significant liberalization of Arkansas medical malpractice law.

John D. Nichols